



NATIONAL WILDLIFE FEDERATION<sup>®</sup>

*People and Nature: Our Future Is in the Balance*

Office of Federal and International Affairs

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

December 1, 1997

Office of the Secretary  
Federal Communications Commission  
Washington, D.C. 20554

**Re: Petition for Preparation of an Environmental Impact Statement and Reply Comments on FCC 97-296, in the Matter of Preemption of State and Local Zoning and Land Use Restriction on the Siting, Placement, and Construction of Broadcast Station Transmission Facilities (MM Docket No. 97-182).**

Dear Secretary:

I am writing on behalf of the National Wildlife Federation (NWF), the nation's largest conservation, education, and advocacy organization, to oppose the proposed rule, FCC 97-296. The rule, supported by the broadcast industry, would preempt local and state environmental statutes and land use controls in an effort to speed the construction of broadcast towers. The proposed rule lacks adequate statutory authority. It also contradicts federal laws and executive orders that call for the protection of natural resources and that rely upon state and local measures to advance national conservation goals. Worse, with hundreds of towers slated to be built within the next few years, preemption of state and local environmental laws that apply to tower siting and operation is guaranteed to result in significant environmental damage on the ground. NWF urges the Federal Communications Commission (Commission) to reject the proposed rule; at a minimum, the National Environmental Policy Act (NEPA) indicates that a full environmental impact statement must be prepared before the Commission can decide to issue the proposed rule.

NWF opposes the proposed rule because it would cause significant environmental harm. Broadcast towers are often sited in wetlands or on ridges and mountain tops, and construction impacts can permanently damage these fragile habitats. Collisions with radio and TV broadcast towers kill an estimated 1.2 million birds each year; the red safety lights often used on towers have been found to attract flocks of migrating birds, leading to increased bird injury and mortality.<sup>1</sup> State and local laws that govern the siting and operation of broadcast towers help avert or reduce these impacts. By preempting these laws, the proposed rule would ensure that construction and operation of broadcast towers will cause significantly greater harm than state

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<sup>1</sup> TV Towers Take Deadly Toll on Night-Migrating Birds, Buffalo News, October 6, 1996, 1C; Mysterious Flights, Under Cover of Night, Chicago Tribune, November 3, 1985, F14

and local laws currently permit.

From the outset, it is far from clear that the Commission has the authority to issue the proposed preemption rule. The proposed rule is overbroad, overriding state and local laws on behalf of all broadcast towers, not merely digital television (DTV) towers. Yet, in its rationale for preemption, the Commission cites only a perceived need for a rapid roll out of DTV, not for other types of stations. Moreover, even in the context of DTV, the authority cited for the proposed rule is unconvincing. While it is clear that Congress wished the Commission to recover bandwidth expeditiously as broadcasters convert to DTV, nothing in the 1996 Telecommunications Act or its legislative history suggests that Congress intended the modest goal of recovering bandwidth to vitiate state and local environmental protections.

Additionally, the proposed rule would set the terrible precedent of overruling legitimate state and local environmental laws on behalf of a special interest merely because it claims to find the laws burdensome. The proposed rule would allow state and local authorities to disapprove tower applications only where the state and local laws protect "health and safety" objectives, and it fails to indicate that this encompasses conservation or environmental objectives. Traditionally, wildlife and habitat protection has been a clear prerogative of the states, and conservation objectives have long been an integral part of local land use planning. The proposed rule, however, signally fails to make clear that conservation goals are legitimate grounds on which a local or state authority can deny approval for a broadcast tower. As drafted, the proposed rule could be read by an arbiter or a court to preempt most state and local laws that protect endangered species, wildlife, and habitat.

The proposal to impose a deadline on state and local permit processes, and to treat a missed deadline as a constructive approval, is both radical and destructive. We know of no existing federal regulation that binds so totally, within such a short timeframe, a state's use of its authority to protect the environment. The 21-, 30-, and 45-day deadlines in the proposed rule are simply unrealistic. By comparison, the U.S. Army Corps of Engineers takes an average of 120 days to review applications for projects in wetlands,<sup>2</sup> and the regulations of the U.S. Fish and Wildlife Service (USFWS) grant that agency at least 135 days to conduct a formal consultation and prepare a biological opinion where a project may affect a threatened or endangered species.<sup>3</sup> Shortening this time precludes conscientious assessment of alternative sites and makes meaningful public notice and comment impossible. The proposed rule would reduce state and local review of broadcast tower applications to an exercise in rubber-stamping.

The proposed rule threatens federal as well as state and local conservation efforts. While the Commission's discussion presents the proposed rule as a matter of balancing the federal interest in DTV against local environmental, health, and safety interests, the balance should make room for federal environmental interests as well. Those interests weigh solidly against the proposed rule.

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<sup>2</sup> U.S. Army Corps of Engineers, Statistical Report (July 1995).

<sup>3</sup> 50 CFR §402.14

For example, the Clean Water Act Section 404 federal wetlands protection program and Executive Order 11990 on the Protection of Wetlands call for development projects, including broadcast towers, to be located outside of wetlands where possible. The federal wetlands program is often delegated to states on the understanding that their laws will remain as protective as the federal program. In preempting state laws, the proposed rule undermines these delegated programs and directly conflicts with federal policy.

Ultimately the proposed rule reads as an inappropriate special interest grab for a blanket exemption from state and local laws. Far from state and local laws being the bar to advancing DTV technology, the primary obstacle to new broadcast towers is the shortage of trained personnel to erect them. And far from being unduly burdensome, the state and local laws applied to towers are consistent with the laws applied to other, no less valuable development projects. In fact, the permit "horror stories" offered in the broadcast industry's petition for the proposed rule are strikingly conventional (and unhorrific). The state and local permit processes described in the petition are typical of those applied to major development projects of all kinds: retail stores; housing developments; industrial plants; public facilities. Given the weak statutory basis of the rule, its issuance could open the door to a host of similar proposals before other federal agencies with similarly vague mandates to promote housing, transportation, and commercial development.

In any event, before the Commission can resolve to issue the proposed rule, it must consult with the USFWS to ensure that the proposed rule will not harm any threatened and endangered species. Section §7(d) of the Endangered Species Act requires consultation whenever a federal action may affect a protected species. Threatened and endangered migratory birds are among those that suffer from collisions with broadcast towers. Thus, the Commission must consult with USFWS before proceeding with the proposed rule.

The Commission must also prepare an Environmental Impact Statement (EIS) and must solicit public comment on that EIS. The National Environmental Policy Act (NEPA) requires preparation of an EIS for every major federal action significantly affecting the human environment.<sup>4</sup> A federal decision to preempt state and local laws governing the construction of hundreds of broadcast towers is unquestionably a major federal action; and as noted above, giving these towers free rein to ignore state and local environmental laws would have significant and lasting harmful impacts. Moreover, the Commission's regulations at 47 CFR §1.1307(a) require thorough environmental analysis of any action that may affect a listed species or may lead to construction in wetlands. This letter in opposition to the proposed rule comprises a petition under 47 CFR 1.1307(c) requesting the preparation of an environmental impact statement on the proposed rule.

In closing, NWF opposes the rule to preempt state and local zoning and land use restrictions on the placement and construction of broadcast station transmission facilities. The proposed rule would cause significant environmental destruction, and would set a damaging precedent by

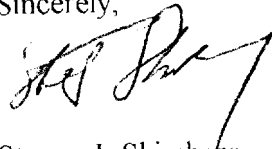
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<sup>4</sup> NEPA §102, 42 U.S.C. §4332.

federally mandating a special interest exception from legitimate state and local laws. NWF urges the Commission to reject the proposed rule; but at the very least, a full environmental impact review must be conducted before the rule can be issued.

Thank you for your consideration of these comments. If the Commission decides to move ahead with consideration of the proposed rule, please add us to the public notice list, as NWF will want to submit comments on the draft EIS.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Shimberg", written over a horizontal line.

Steven J. Shimberg  
Vice President, Federal and International Affairs